UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KENNY SIEPKER, Defendant.	No. **CR01-3057 MWB** **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

I. INTRODUCTION

This matter is before the court on the Motion to Suppress (Doc. No. 55) filed by the defendant Kenny Siepker ("Siepker") on April 16, 2002. Siepker is under indictment on charges of conspiracy to distribute methamphetamine, possession of firearms by a felon, and interstate transportation of firearms by a felon. (Indictment, Doc. No. 1) Siepker filed a brief in support of his motion on April 22, 2002 (Doc. No. 61). The plaintiff (the "Government") filed a resistance on April 24, 2002 (Doc. No. 63).

The Trial Scheduling and Management Order (Doc. No. 6) entered in this case on October 29, 2001, assigned motions to suppress in this case to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. Accordingly, the court held a hearing on the motion on May 9, 2002. Assistant United States Attorney C.J. Williams appeared for the Government. Siepker appeared in person with his attorney, John L. Lane.

The Government offered the testimony of Mason City Police Lieutenant[1] Mike McKelvey ("Officer McKelvey"). The following exhibits were admitted into evidence: Gov't Ex. 1, videotape of the incident in question; Gov't Ex. 2, transcript of the videotape.[2] The court now deems the motion to be fully submitted and ready for decision.

II. FACTUAL BACKGROUND

On January 29, 2002, Officer McKelvey was on routine patrol in Mason City, Iowa. At approximately 5:50 p.m., he was sitting in his patrol car at a stop sign, facing south, at the intersection of 13th and North Pennsylvania Avenue. It was already dark outside, and the officer had his headlights on. A car drove by on the cross street, traveling from the officer's left to his right. As the car passed, the officer's headlights shone into the car through the passenger's window. The officer recognized the passenger as Siepker, and he thought the car's driver was Mike Lowe. Officer McKelvey was aware Lowe had a recent conviction that should have resulted in suspension of his driver's license, and he also knew there was an outstanding warrant for Lowe's arrest on a parole violation.

Officer McKelvey turned right and began following Lowe's vehicle. He did not yet activate his emergency lights. Lowe made a number of quick turns, traveling roughly in a circle. He appeared to be trying to lose Officer McKelvey. Lowe ultimately drove into a commercial alley behind some businesses and parked. None of the businesses were open and no people were behind the buildings. The area was poorly lighted. Officer McKelvey drove up slowly and parked behind Lowe's vehicle. He got out of his patrol car and approached the driver's window of Lowe's vehicle. The vehicle was turned off, no interior

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[1]At the time of the incident in question in this case, Officer McKelvey was a Sergeant with the Mason City Police Department.

[2]The court finds the transcript submitted by the Government to be inaccurate in some respects, as discussed at note 3, *infra.*

lights were on, and the headlights had been turned off. The officer could tell the car's occupants had seen him, but neither of them got out of the car and they were looking straight ahead.

When Officer McKelvey reached the driver's window, Lowe turned his head to the right, away from the officer. Officer McKelvey began speaking to Lowe through the window, asking questions about what they were doing, where they were going, and the like. Lowe was evasive. He said they were going to a friend's house, but he did not know the friend's name. Siepker eventually said the friend's name was James Smith. The officer asked Lowe for identification, which Lowe provided.

Officer McKelvey returned to his patrol car and called for backup while he verified Lowe's license status and the arrest warrant. Officers Tom Mock and Steve Klemas arrived, in separate vehicles. Although Officer McKelvey had a video camera on his patrol car, the camera was not working. As soon as Officer Klemas arrived, he activated the video camera on his patrol car, and videotaped the remainder of the encounter. (Gov't Ex. 1) Officer McKelvey confirmed that Lowe's license had been suspended, and there was a valid warrant outstanding for a probation revocation. Officers McKelvey and Klemas approached Lowe and placed him under arrest. Officer McKelvey directed Officer Mock to stand next to the passenger side of the car, where Siepker was seated, while the other officers processed Lowe. Lowe was searched incident to his arrest, and a large amount of paraphernalia was found in the pockets of his coat. Lowe said the coat he was wearing was not his, but he would not tell the officers whose coat it was.

After they had finished with Lowe and placed him in a patrol car, Officers McKelvey and Klemas returned to the car. They planned to search the car incident to Lowe's arrest. Officer Klemas told Siepker to get out of the car, but Siepker locked the car doors from the inside. Officer McKelvey went to the driver's side window, which was down a few inches, and reached inside. He was able to unlock the car's doors using the electric door lock. As

soon as he did so, Officer Klemas pulled open the passenger door. Officer Klemas again asked Siepker to get out of the car. Siepker put his hands in his pockets as he got out of the car. Officer Klemas told Siepker to keep his hands out of his pockets, but Siepker did not comply.[3] Officer Klemas reached toward Siepker with the intent of removing Siepker's hands from his pockets and conducting a pat-down search. Siepker pulled away, became very agitated, and began flailing around. It took all three officers to take Siepker to the ground, remove his hands from his pockets, and place him in handcuffs. While Siepker was thrashing wildly about and rolling on the ground, he kicked one of the officers.

Siepker was arrested for interference with official acts. The officers searched Siepker incident to his arrest. In Siepker's left coat pocket were some gloves and a large

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[3]The court finds the Government's transcription of the videotape at this point to be inaccurate. The court finds an accurate transcription of the tape, beginning at time index 17:53:27, to be as follows:

KLEMAS: Kenny, I want you to step out for me.
SIEPKER: Am I under arrest now?
KLEMAS: Kenny, you need to unlock the door and step out, --
SIEPKER: I don't want . . .
KLEMAS: – okay? It's Klemas.
SIEPKER: I know you damn well.
KLEMAS: I know, that's why I'm sayin', let's not go through the rigamarole. You got any knives, guns, weapons on you?
SIEPKER: You know damn well I ain't got no weapons.
KLEMAS: Anything that could hurt me?
SIEPKER: Am I under arrest? What've I done wrong, man?
KLEMAS: We're going to conduct a pat-down for our safety and yours.
SIEPKER: Look, man, . . .
KLEMAS: Keep your hands outa your pockets, Kenny.
SIEPKER: No – just gloves and stuff, look, Klemas.
KLEMAS: Kenny. . . .
SIEPKER: Okay. I'm not resistin'.
KLEMAS: Put your hands behind your back. Do it now or you're gonna go to the ground and be hurt.
SIEPKER: Why am I under arrest?
KLEMAS: You're not under arrest, you're bein' placed in handcuffs.

The Government's transcript, at page 4, indicates Officer Klemas told Siepker to keep his hands <u>in</u> his pockets.

wad of currency. In his right pocket were more gloves and a Ziplock bag containing methamphetamine. Siepker also was carrying a cell phone, two notebooks, some pocket knives, and keys. Siepker was taken to the county jail, where a further search was conducted by jail personnel. They found a small baggie of methamphetamine in the watch pocket of Siepker's jeans.

Siepker seeks to suppress all the evidence found on his person at the scene. While Siepker concedes the officers had a right to ask him to get out of the Lowe vehicle, he argues the officers lacked a reasonable, articulable suspicion that Siepker might be armed, as required for a *Terry*-type search.[4]

III. LEGAL ANALYSIS

The analysis begins with the Fourth Amendment's guarantee of a person's right to be secure against unreasonable searches and seizures of his or her person, house, papers and effects. The United States Supreme Court has held repeatedly that "searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334 (1993) (internal quotation marks, citations omitted).

One such exception was recognized by the Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Terry* considered the right of a police officer to stop and inquire of a person engaging in suspicious activity which leads the officer to believe a crime may be taking place. In that context, the Court further considered whether the officer

[4]*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

making the inquiry can search the individual whose behavior is being investigated. The *Dickerson* Court explained the *Terry* holding as follows:

> "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . ." Rather, a protective search – permitted without a warrant and on the basis of reasonable suspicion less than probable cause – must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.

Dickerson, 508 U.S. at 373, 113 S. Ct. at 2136 (citations omitted) (quoting *Terry*, *supra*, 392 U.S. at 24, 26, 88 S. Ct. at 1881, 1882; *Adams v. Williams*, 407 U.S. 143, 145-46, 92 S. Ct. 1921, 1922-23, 32 L. Ed. 2d 612 (1972)). The officer's justification for conducting a *Terry*-type search must be reasonably based on "specific and articulable facts . . ., together with rational inferences from those facts." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1868. The Court noted that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* n.18.

The *Terry* court explained the duty of a reviewing court in considering the propriety of such a search:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the

> particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple "good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.'

Terry, 392 U.S. at 21-22, 88 S. Ct. at 1880 (footnote, citations omitted); *accord United States v. Roggeman*, 279 F.3d 573, 577 (8th Cir. 2002).

Whether an officer has a reasonable, articulable suspicion that a suspect is armed and dangerous is measured by an objective standard. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Roggeman*, 279 F.3d at 578. Each case must be decided on its own facts. *Id.*

In the present case, the officers were faced with a suspect, Siepker, who refused to get out of a car in a dark alley. He had locked the doors and would not get out. When the officers got the door open, Siepker put his hands inside the pockets of his bulky coat. He acted agitated and belligerent from the very start of his contact with the officers. Further, the officers had discovered a lot of paraphernalia on Siepker's companion, Lowe, and Lowe said the paraphernalia was not his.

In addition, the officers knew weapons are often used in connection with drug transactions. They knew Siepker had a prior drug conviction, and was on pretrial release from a pending federal indictment involving drug charges. Considering the totality of the

circumstances, that court finds that when Siepker did not comply with Officer Klemas's instruction to remove his hands from his pockets, it was reasonable for the officers to fear for their own safety and to conduct a pat-down search for weapons.

Notably, it appears from the record that the officers intended to conduct a pat-down search of Siepker even before he refused to get out of the car, and before he placed his hands in his pockets. The circumstances up to that point arguably may not have warranted a *Terry*-type search; however, that question need not be reached because regardless of the officers' intentions, they did not attempt to perform a pat-down search until after Siepker had refused to get out of the car and then had placed his hands inside his pockets. The court finds the officers had, at that point, a reasonable, articulable basis for believing Siepker might be armed.

Moreover, even if no justification existed for a pat-down search of Siepker, once Siepker refused to comply with the officers' instructions, he was subject to arrest for interference with official acts and could be searched incident to his arrest. Here, the officers never carried out a *Terry*-type search; the only search that actually occurred was incident to Siepker's arrest.

For these reasons, the court recommends Siepker's motion to suppress be denied.

IV. CONCLUSION

IT IS RECOMMENDED, unless any party files objections[5] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Siepker's motion to suppress evidence (Doc. No. 55) be **denied**.

IT IS SO ORDERED.

DATED this 13th day of May, 2002.

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PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[5]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).